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No. 86-188

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1986

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GEORGE M. SIMMONS AND ALAN'S COAL SALES,
*Petitioners,*

v.

HARRISON COMBS, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## BRIEF IN OPPOSITION FOR RESPONDENTS, HARRISON COMBS, *et al.*

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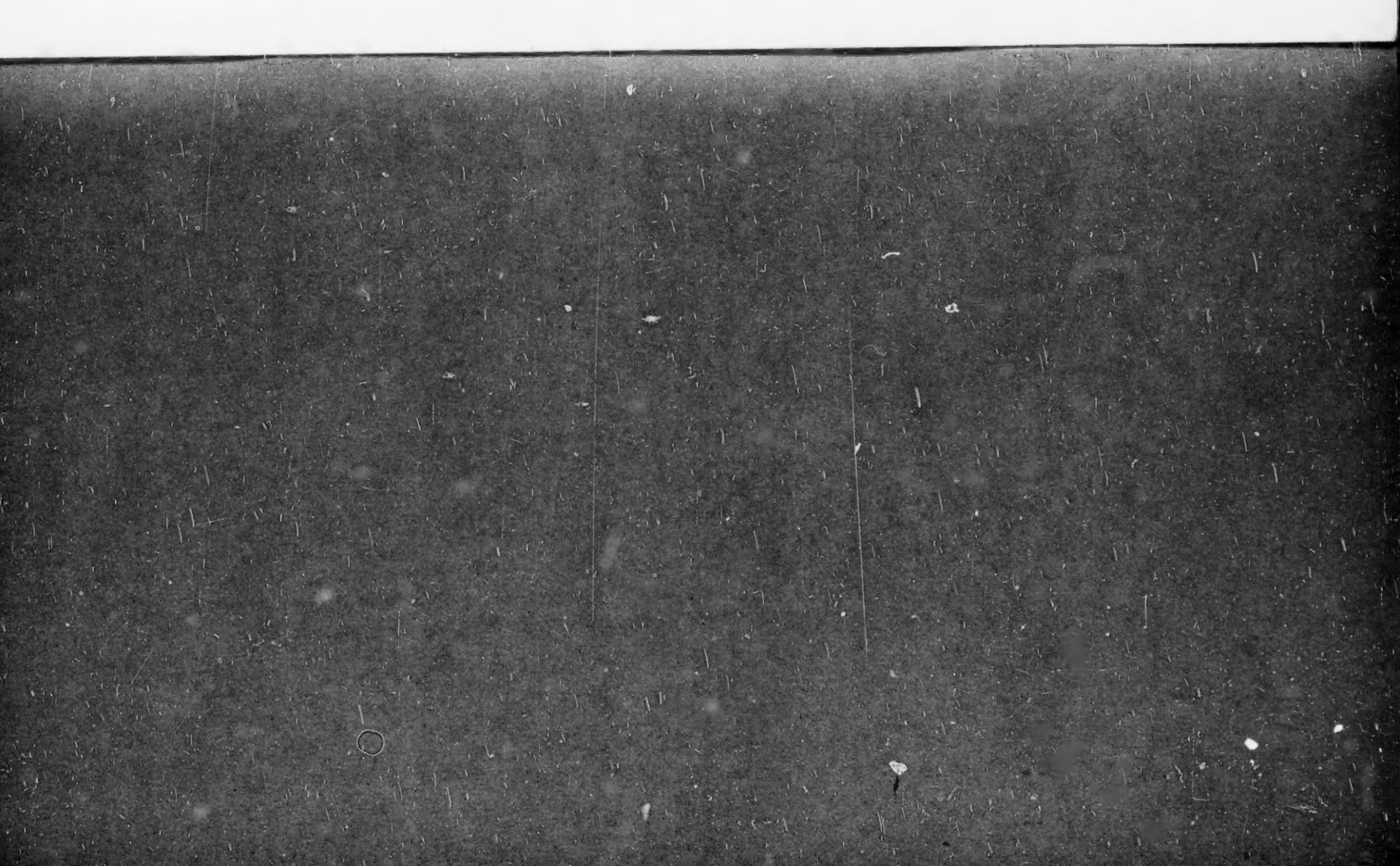

## QUESTIONS PRESENTED

Respondents, Trustees of the United Mine Workers Health and Retirement Funds, do not agree with the Petitioners statement of the Questions Presented. The only questions properly presented by the Eleventh Circuit's Opinion and Judgment affirming the District Court's Judgment for Respondents, and remanding in part for further proceedings, are as follows:

1. Where the Petitioners failed to abide by the terms of the Consent Decree, did the Court of Appeals properly affirm the District Court's entry of a final judgment against Petitioners for the amounts due and accrued under the terms of the Consent Decree?

2. Did the Court of Appeals properly affirm that the Consent Decree was entered consistent with Rule 65 of the Federal Rules of Civil Procedure?

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The Respondents, Harrison Combs, John J. O'Connell and Paul R. Dean, Trustees of the United Mine Workers of America Health and Retirement Funds, submit that the Petition for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Eleventh Circuit entered on April 2, 1986, should be denied. The Trustees concur with Petitioners' discussion of the "Opinions Below, Jurisdiction, and the Constitutional Provisions, Statutes and Rules Involved."

## I. COUNTERSTATEMENT OF THE CASE

Respondents, Trustees of the United Mine Workers of America Health and Retirement Funds ("Trustees"), refer to the Court of Appeals detailed statement of the course of proceedings and disposition of this case before the District Court. (See App. 6-12)[1]

In addition, the Trustees submit the following, omitted from the Petitioner's Statement of the Case, as material to the questions presented:

The parties, including Petitioner Simmons for Ryan's Coal, drafted and moved the District Court for entry of the January 14, 1985, Consent Decree and Order that Petitioners now challenge as defective under Rule 65 of the Federal Rules of Civil Procedure. The Consent Decree expressly required that Ryan's Coal make royalty contributions to the Trustees based upon coal tonnage and hours worked by employees. The Consent Decree provided the Trustees with recovery of a past delinquency through a payment schedule to expire on January 1, 1987, during which time the District Court was to retain jurisdiction to assure compliance with the terms of the Decree. Petitioner Simmons for Ryan's expressly acknowledged that the scheduled payments were for a debt due and payable to the Trustees. The Decree called for acceleration of the entire debt in the event of default. Finally, the Consent Decree bound successors (Petitioner Alan's Coal Sales) to its terms.[2] (R.E. 6)

The Petitioners in their Answers in the District Court did not request trial by jury. (R.E. 19, 21)

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[1] References to the Petition herein, its Appendix, and the Record Excerpts in the Court of Appeals are as follows: "Pet. ——"; App. ——"; and "R.E. ——."

[2] Petitioners Simmons and Alan's Coal Sales do not here seek review of the District Court's finding, affirmed by the Court of Appeals, that they, respectively, were the alter-ego and successor of Ryan's Coal Company.

## II. REASONS FOR DENYING THE WRIT

### A. The Petitioners' Argument (Pet. 7) That The Money Judgment Against Them Was Improper Is Merely A Veiled Attack Upon The Alter-Ego/Successor Finding For Which They Do Not Seek Review. The Opinion Below Faithfully Follows This Court's Decisions And Presents No Important Issue Of Statutory Construction.

The Petitioners' simplistic approach that a civil money judgment was improperly obtained against them in a manner outside the scope of the Federal Rules of Civil Procedure is fundamentally flawed.

First, the Petitioners ignore that the Consent Decree provided for injunctive relief in addition to the judgment for money, payable in installments, and subject to acceleration in the event of default. To monitor compliance with the terms of the Consent Decree, the parties agreed and the District Court ordered that it would retain jurisdiction to assure compliance.

Accordingly, Petitioners' argument that the decision below ". . . allowed the expansion of a money judgment to include non-parties through the vehicle of a judgment enforcement proceeding, such as contempt" (Pet. 10) is misleading because the Consent Decree contained injunctive relief for which contempt remedies were available.

Secondly, the Petitioners were parties. The Opinion below (App. 28-30) affirmed the District Court's finding that Petitioner Simmons was the alter-ego of Ryan's Coal and Petitioner Alan's Coal Sales was the successor of Ryan's under the terms of the Consent Decree. The Court of Appeals answered the Petitioners' argument here, the same argument raised below but in relation to the appealability of the District Court's alter-ego/successor finding:

> "While Alan's and Simmons were not parties to the original consent decree entered in January, the trial

> court found in its order of November 13 that they were the successor and 'alter-ego,' respectively, of Ryan's. Thus, while they were not named defendants in the consent decree, their interests were in fact represented and their obligations determined as a matter of law. They were there but merely hidden behind the corporate veil which the trial court pierced in the November 13 order." (App. 16)
>
> * * * *
>
> "[T]here was no modification as to the party obligors because the trial court's finding that Alan's is the successor and Simmons the 'alter-ego' of Ryan's means that they were, in effect, before the court for the original decree." (App. 16, 17)

Again, the Petitioners do not directly seek review in this Court of the Court of Appeals affirmance of the District Court's finding of alter-ego/successor.

The Petitioners nonetheless urge the Opinion below conflicts with the Courts of Appeals decisions in *North Pacific Steamship Co. v. Pyramid Bulk Carrier, Inc.*, 555 F.2d 426 (5th Cir. 1975),[3] and *Parker v. United States*, 126 F.2d 370 (1st Cir. 1942).

*Parker*, not cited in the Opinion below, is a 1942 case factually dissimilar. Parker was incarcerated for contempt for failure to require the offender corporation to comply with an injunction. The First Circuit set aside the incarceration because the corporation was within the jurisdiction of the bankruptcy court, and the incarceration had no coercive effects and was therefore punitive. The First Circuit did, however, recognize the availability of compensatory civil contempt remedies even without an "alter-ego" finding. 126 F.2d at p. 380. Therefore,

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[3] There is no such conflict between the Fifth and Eleventh Circuits. Former Fifth Circuit authority is binding on the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

*Parker* falls on different facts and is not in conflict with the Court of Appeals below.

To the extent the Petitioners assert *North Pacific Steamship Co.* for the proposition that there is a conflict within the Eleventh Circuit, *see* ftn. 3, the Court of Appeals Opinion put to rest any such notion. The Court of Appeals recognized that the *North Pacific* ". . . panel went on to state that it was not foreclosing the use of 'alter-ego' doctrine or the piercing of a judgment debtor's corporate veil '[u]nder proper circumstances and procedures.'" (App. 29) Then, the Court distinguished *North Pacific*, an admiralty case, and followed this Court's successor/alter-ego cases decided under analogous labor law statutes. *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 65 S. Ct. 478 (1945); *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 69 S.Ct. 497 (1949); *Walling v. Reuter Co.*, 321 U.S. 671, 64 S.Ct. 826 (1944).

There thus exists no such conflict among the Circuits which would warrant review before this Court.

**B. Petitioners' Argument That They Were Entitled To A Trial By Jury Does Not Merit Review By This Court.**

For several reasons, the Court of Appeals did not address the Petitioners' argument that they were entitled to trial by jury. First, the Petitioners did not raise the entitlement to a jury trial as one of their principal arguments before the Court of Appeals. Secondly, the argument is based upon Petitioners' claim that they were non-parties to the proceeding, and as shown in our argument above, the Petitioners were parties to the proceeding with their interests at all times represented. Finally, aside from the Petitioners non-party argument, they never demanded a trial by jury at any stage of the proceedings before the District Court.

The Petitioners seek review in this Court based upon speculation:

> ". . . we may *speculate* that [the Court of Appeals] concluded that a jury trial is not required because this action was brought under [ERISA], . . . *If* the Eleventh Circuit's decision is based upon a conclusion that a jury trial is not authorized for such an action it is in conflict with the decision of the U. S. Court of Appeals for the Seventh Circuit in *Bugher v. Feightner*, 722 F.2d 1356 (7th Cir. 1983), . . . The Court should resolve this conflict between circuits by granting the petition for certiorari in this case." (Emphasis added) (Pet. 12)

Petitioners' speculation, without the Court of Appeals decision on the issue, does not create a conflict among the Circuits, and the Petitioners' attempt to manufacture a conflict should be rejected.

**C. The Opinion Below Faithfully Follows This Court's Past Decisions In Affirming That The Consent Decree In This Case Was Entered In Conformance With Rule 65(d) Of The FRCP.**

The Opinion below carefully analyzed the particulars of the Consent Decree in this case and its injunctive provisions, and applied this Court's controlling precedent.

> "The appropriate inquiry is into the degree of specificity of the language of the decree in order to determine that appellate review is possible and that the contemnors knew their obligations. *Schmidt v. Lessard*, 414 U.S. 473, 476-77, 94 S.Ct. 713, 715-16, 39 L.Ed.2d 661 (1974) (*per curiam*). The Supreme Court in *International Longshoremen's Assoc., Local 1291 v. Philadelphia Marine Trade Assoc.*, 389 U.S. 64, 88 S.Ct. 201, 19 L.Ed.2d 236 (1967), considered the specificity and incorporation by reference provisions of Rule 65(d). Contrary to appellant's suggestion, the Court did not announce a *per se* requirement of dismissal where a trial court fails to adhere strictly to the provisions of the Rule. As the Court in *Longshoremen's* noted, it was not dealing 'with a violation of a court order by one who fully understands its meaning but chooses to ignore its man-

> date[, but rather with] a decree that can only be described as unintelligible.' 389 U.S. at 76, 88 S.Ct. at 208. The Court's concern was with notice, with ensuring that the trial court's decree not furnish a basis for contempt unless it constituted 'an operative command capable of 'enforcement.'' *Id.* at 74, 88 S.Ct. at 206; *accord*, *Schmidt*, 414 U.S. at 476, 94 S.Ct. at 715. In this case there is no question but that the decree was intelligible and capable of enforcement. Nor is there any question as to whether the appellants understood their obligations, for they complied with the decree for almost three months." (App. 19, 20)

The Court of Appeals explained that its binding precedent in the former Fifth Circuit, *United States Steel Corp. v. United Mine Workers*, 519 F.2d 1236 (5th Cir. 1975), *cert. denied*, 428 U.S. 910, 96 S.Ct. 322 (1976), did not preclude the Court from examining the specificity requirements of Rule 65(d) within the posture of the facts of a particular case. (App. 20)

The Court of Appeals further noted the Petitioners themselves crafted the Consent Decree, did not seek clarification or modification of its terms, and indeed complied with the terms of the Consent Decree for a period of time. (App. 21) *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192, 96 S.Ct. 497, 500 (1949); *Newman v. State of Alabama*, 683 F.2d 1312, 1318 & n. 15 (11th Cir. 1982), *cert. denied*, 460 U.S. 1083, 103 S.Ct. 1773 (1983).

The Petitioners' conclusion that the Eleventh Circuit "impliedly acknowledged" a violation of the specificity requirements of Rule 65(d) is simply not borne out by the Court's careful analysis and conformance with the mandate in *International Longshoremen's Assoc., Local 1291 v. Philadelphia Marine Trade Assoc.*, 389 U.S. 64, 88 S.Ct. 201 (1967).

Likewise, the Petitioners' argument that the Court of Appeals somehow required a motion to modify or clarify

is without merit. The Petitioners' failure to seek clarification of the Consent Decree they drafted, abided by for a period of time, then knowingly violated, merely underscores the anomaly of Petitioners' contention as viewed by the Court of Appeals, and does not raise a conflict among the Circuits.

**D. The Anomaly Continues With Petitioners' Contention That The District Court Lacked Jurisdiction To Modify The Consent Decree.**

Petitioners stake their entire argument here that the Court of Appeals determined the Consent Decree was a money judgment in January with a subsequent November modification. (Pet. 15) Thus, contend Petitioners, the ten day time limit in Rule 59 of the Federal Rules of Civil Procedure applies to preclude District Court jurisdiction to modify.[4]

Taken in the context of the contempt proceedings, the Court of Appeals stated:

> "The court's order of November 25, however, abandoned the avenue of contempt down which it had started to move on November 13. Instead the court simply entered a final civil judgment determining the current obligations of the appellants to the appellees. That judgment, standing alone, finds that the appellants had not made a good faith effort to fulfill the obligation of the original consent decree and enters a final judgment ordering payment in full of the amount due under the January decree and that which had accrued in the meantime. In effect, then, the November 25 order modified and superceded the money judgment contained in the January consent decree." (App. 24)

Petitioners' argument sounds like this: draft a Consent Decree providing for money owed, injunctive relief

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[4] The Petitioners did not argue below that Rule 59 somehow ousted the District Court from jurisdiction over the terms of the Consent Decree.

including provisions for prospective payments, and an agreement that the District Court will retain jurisdiction; comply with the Consent Decree for ten days; then, violate the provisions calling for prospective payments because such amounts (undisputed in the instant case) can be avoided due to lack of jurisdiction under Rule 59.

A proper reading of the Opinions of the Court of Appeals and District Court clearly show that the District Court took the undisputed amount due and owing at the time of the entry of the Consent Decree in January, and added to that amount the amount of undisputed contributions that had accrued since January and until the entry of the November Order. The Consent Decree provided for the Court to retain jurisdiction during this period of time and allow for acceleration in the event of default. The Consent Decree enjoined the Petitioners to make current payments; they did not. The District Court merely tallied the undisputed amounts due and owing to the Respondents.

## CONCLUSION

For the reasons assigned, the petition for a writ of certiorari to the United States Court of Appeals to the Eleventh Circuit should be denied.

Respectfully submitted,

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